

## [Review] Brett Christophers (2016) The great leveler: capitalism and competition in the court of law

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**Brett Christophers *The Great Leveler: Capitalism and Competition in the Court of Law* (Cambridge, Mass.: Harvard University Press, 2016)**

What role does law play *vis-à-vis* capitalism's inherent tendency towards crisis? This is the subject of Brett Christophers' book *The Great Leveler*. The book's main objective is to demonstrate the law's historical and contemporary role in regulating capitalism such that it remains stable and continues to reproduce itself profitably. Law, Christophers argues, functions in such a way as to level out, or redress, historical imbalances and tensions in what he calls the monopoly-competition dialectic that destabilise capital accumulation. This is achieved through two forms of law – intellectual property (IP) and antitrust/competition (A/C) law. Thus, during periods of excessive competition (characterised, *inter alia*, by low prices and dwindling profits), IP law becomes prominent and works to temper this by facilitating and protecting the monopoly side of the dialectic; in times of excessive monopoly power (associated with stagnation, rent-seeking, and low wages), A/C law kicks in to ameliorate this, thereby restoring harmony to the dialectic. While Christophers notes that those two forms of law have not been solely responsible for levelling out those imbalances, in his view their role in this regard has been of paramount importance. It is the neglect of this role – indeed of law's role generally *vis-à-vis* political economy – in the existing literature that *The Great Leveler* is designed to highlight and rectify.

The book's first Part – 'Leveling in Theory' – sets out the conceptual framework within which the discussion of law's practical role in managing the monopoly-competition dialectic in Part II. Christophers locates this framework in Marx's conceptualisation of capitalism as, in Christophers' words, 'always, necessarily, teetering on a knife edge, balanced precariously between the contradictory forces of competition and monopoly, and perennially in danger of lapsing too far to one side or the other.' Unlike those – including Adam Smith – who consider competition and monopoly as separate, unrelated entities, Christophers deploys Marx's notion of the relation between the two as dynamic and dialectical – monopoly is essential for the production of competition, just as competition inevitably creates monopoly. The resulting assumption is that the reproduction of capitalism depends upon an albeit unstable balance always being struck between the two. As David Harvey, to whom Christophers refers, has it, the challenge for capital is to keep economic relations sufficiently competitive without jeopardising 'the individual and class monopoly privileges of private property that are the foundation of capitalism as a political-economic system'.

In the final chapter of Part I, Christophers sets out a conceptual understanding of A/C law and IP law that mirrors the dialectical relation of competition and monopoly. Like the latter relation, those laws are not to be viewed in an oppositional way, but as dynamic and as having a common objective. While each functions to correct excessive shifts in the directions of monopoly (A/C law) or competition (IP law), in doing so they work towards the shared goal of maintaining capitalism's balance and

reproducibility. More specifically, Christophers identifies exchange relations, rather than production, as the target of these laws' intervention (though he notes that the two are not discrete, as alterations in the former have consequences for the latter). Thus, on the one hand, A/C law endeavours to tackle market power, thereby reducing monopoly prices and profits; whereas, on the other hand, IP law, through its *construction* of monopoly power, intervenes in exchange relations in order to address the opposite threat to capital – namely, low profit margins that disincentivise investment.

In Part II of the book, Christophers focuses on the US and UK in order to present a historical analysis of how, practically, A/C and IP law have contributed to the success of capitalism by ensuring monopoly and competition approximate as closely as possible to a state of harmony. The chapters in this Part cover three eras during the twentieth century when, according to Christophers, law had a 'levelling' effect on Anglo-American capitalist political economy. The first period is the beginning of the twentieth century when law worked to redress the excessive competition that had developed in the latter decades of the nineteenth century and its detrimental economic effects, by strengthening monopoly power. The second era relates to the period between post-WWII and the mid-1970s – the so-called 'capitalist golden age' – in which competition law sought to address what by then had become a state of affairs in which monopoly power reigned and was having negative effects such as reduced demand and a weakened labour force. Christophers traces how law shifted from shoring up monopoly power to supporting competition – the change lying in

both the different role of A/C law (in the UK, the very coming into existence of competition law) and a new interpretation by members of the judiciary of the relationship between IP law and A/C law, such that the application of IP law functioned to facilitate competition. Christophers also identifies the impact of various 'political-economic agents' that enabled this shift to competition to materialise. The measure of redressing balance in the dialectic in the UK during this period was the empowerment of labour, identified in its greater share of income. By stimulating increased levels of competition, A/C law played a crucial role in this outcome.

Finally, Christophers characterises the period from the mid-1970s to the present as one of a return to monopoly power, though unlike earlier in the twentieth century, this is now characterised by its greater degree of internationalisation and foreign competition. Taking the US and the UK as examples of this transformation, Christophers once again stresses its political-economic dimension – namely the imbalance, in favour of competition, that now existed in the competition-monopoly dialectic and the threat this posed to capitalism's reproduction and stability as profit margins declined and levels of innovation and investment stagnated. Once more, Christophers argues that the law came to the rescue by supporting monopoly through the greater emphasis placed on IP law.

*The Great Leveler* has several strengths, only two of which are noted here. First, and at a general level, it explores a crucial, though often neglected issue today – namely,

the nature of the relationship between law and capitalism. And it does so in a way that provides a much needed and refreshing antidote to the type of law and economics literature founded upon an unwavering devotion to the diktats of neoclassical economics. Against this, Christophers' book offers a critical approach to law and political economy grounded in Marx's work and that of those – such as David Harvey – whom Marx has inspired. This allows Christophers to tie up his account of the dialectical nature of competition and monopoly to questions such as profit margins and the (dis)empowerment of labour, while also taking to task a form of Marxism too focused on questions of, and assumptions about, the capitalist class and its instrumental use of the law. Secondly, the book's strength lies in its emphasis on the historical role played by a range of factors in the shifting importance of A/C and IP law, and the corresponding dominance of competition and monopoly power, in different eras. Thus, institutions, legal doctrine, judicial personality, developments in academic thinking (e.g. the influence of the Chicago School of Economics both in the US and the EU) and their influence on legal practice, political lobbying aimed at altering the form and enforcement of IP and A/C laws, as well as economic imperatives – for Christophers, all had, and have, their role to play in understanding the shifts in the balance of competition and monopoly across the three eras discussed in the book. The book's methodology is therefore multifaceted and exemplifies what is best in the socio-legal or contextual approach to the study of law.

Given these strengths, it is surprising that Christophers does not draw on a rich history of literature in the sociology of law that explores the relationship between law and capitalism. For instance, it is interesting that there is no mention of Max Weber's work on the relationship between law and the rise of capitalism. The idea that there is an affinity between law and capitalism/the needs of capitalists, rather than a unidirectional causal relationship in which movements in the economy determine changes in the law (the classic Marxist understanding of law); the importance of changes internal to the law itself, including in legal education/training and the status needs of the legal profession, and how these play an important part in determining the form of law that emerged as capitalism developed – all of these seem relevant to Christophers' analysis and understanding of the relationship between law and economy in the context he is writing about. For example, Weber identifies within formal rational law the types of features – including the need for predictability and stability – that Christophers highlights as being critical to the levelling function of the law *vis-à-vis* capitalism. At one stage, he speaks of 'the competition-law worldview and ... its calculative and legislative practice', calculability being one of the key characteristics identified by Weber in his analysis of the type of legal system required by economic agents. Thus, while Christophers' conceptual understanding of A/C and IP law, and their dialectical relation, is grounded in Marx, for this reviewer his rich, nuanced historical analysis in Part II of the book owes at least as much, if not more, to Weber's sociology of law and its intricate, wide-ranging explanation of the relationship between law and capitalism.

A final observation relates to the faith that the argument can sometimes be seen to place in the remedial functions of the law (at one point, Christophers says that 'law once again came to the rescue'). Law, in Christophers' narrative, is characterised as a solver of problems, tackling crises in capitalism by reigning in excessive competition/monopoly via the deployment of IP or A/C law. Law's function is to restore balance between the two – to level, in Christophers' phrase. But what of law's possible role in the production of the crises Christophers argues it is designed to tackle? If an excess of, say, monopoly power ultimately results from a situation in which IP law has been applied to redress excessive competition, to what extent might the law itself be complicit in creating capitalist crises or imbalances in the monopoly-competition dialectic? Thus, is law's role in this context solely to be equated with the great leveler; or does the inextricable, reciprocal link between law and political economy that Christophers advocates potentially result in law operating to create the very imbalances in the monopoly-competition dialectic that it seeks to redress?

The foregoing observations are simply that and do not detract in any way from what is a very interesting, impeccably researched, and important book that makes a significant contribution – both theoretically and empirically – to the literature on law's relationship to capitalism.